BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BRIAN S. SMITH Claimant	)	
VS.	)	
DEFFENBAUGH INDUSTRIES, INC. Respondent	)	Docket Nos. 1,054,572 and 1,054,573
AND	)	
FIDELITY & GUARANTY INS. CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the March 30, 2011, preliminary hearing Order entered by Administrative Law Judge Steven J. Howard. Mark E. Kolich, of Lenexa, Kansas, appeared for claimant. Mark J. Hoffmeister, of Overland Park, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) issued one Order in both docketed claims wherein he authorized Dr. Prem Parmar as claimant's treating physician; ordered respondent to pay claimant temporary total disability benefits commencing February 24, 2011, until he is released to substantial or gainful employment by Dr. Parmar; and overruled claimant's objection to respondent's question regarding Dr. Zink's records. The ALJ's Order did not specify for which date of accident or in which docketed claim these benefits were awarded and, therefore, it is presumed that they were awarded in both claims jointly.[1]

[1] Docket No. 1,054,572 has a date of accident of January 29, 2011; Docket No. 1,054,573 has a date of accident of January 17, 2011.

These two docketed claims were consolidated by the ALJ for hearing without objection.[2] The record on appeal is the same as that considered by the ALJ and consists of the transcript of the March 29, 2011, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent first argues that the ALJ erred by failing to rule or even comment on issues concerning whether claimant was injured, whether his injury arose out of and in the course of his employment, whether his termination for a positive drug test affects his eligibility for temporary total disability benefits, and whether he gave respondent proper notice of his accidents. Respondent contends that claimant failed to meet his burden of establishing that he suffered an accidental injury that arose out of and in the course of his employment. Instead, respondent contends that claimant was injured at home and that claimant's testimony is not credible. Respondent further argues that claimant failed to notify respondent of any alleged injury within 10 days and that claimant's request for temporary total disability benefits should be denied because he was terminated for cause when light duty work would have available to him at respondent. Accordingly, respondent asks the Board to reverse the Order of the ALJ.

Claimant argues that since the ALJ awarded benefits to claimant, it would be reasonable to conclude that he found the claim to be compensable. However, in the event the Board disagrees, claimant asks that the Board remand the case to the ALJ for specific findings on those issues. On the issues as set out by respondent, claimant contends the evidence shows that he suffered an accidental injury or injuries that arose out of and in the course of his employment. Claimant argues that the ALJ obviously found his testimony credible, since he found the claim to be compensable, and claimant asks that the Board defer to the ALJ's finding. Claimant further contends he gave respondent proper notice of his accidents and that his delay in reporting his accident of January 17, 2011, was justified. Claimant argues the Board does not have jurisdiction over the issue of temporary total disability benefits. If the Board disagrees, claimant argues that the ALJ's decision need not be reversed because the finding of oxazepam in his drug test could have been a false positive.

The issues for the Board's review in both docketed claims are:

(1) Did claimant suffer accidental injuries on January 17, 2011, and/or January 29, 2011, that arose out of and in the course of his employment with respondent?

(2) Did claimant give respondent timely notice of his accidents?

---

[2] P.H. Trans. at 3.

(3) Is claimant entitled to temporary total disability benefits when he was terminated for cause? Does the Board have jurisdiction over this issue?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant was employed by respondent in July 2010 as a commercial rear-load driver. On January 17, 2011, he slipped on ice while at work and his arms flailed. He did not fall to the ground. His right arm went up past his head, and he felt a burning pain in his right shoulder. He had not had any prior problems with his right shoulder before that event. Claimant finished his shift at work. He did not report his injury to respondent because he was new and did not want to cause himself any problems at work. Also, he was not sure about the severity of his injury. He continued to work, but his right shoulder did not get any better.

On January 25, 2011, claimant went to his personal physician, Dr. Bradley Zink because he wanted some relief from the pain. He still had not reported his injury to respondent. When he arrived at Dr. Zink's office, he told the person weighing him that he had gotten hurt at work. She told claimant that Dr. Zink could not see him if the injury had occurred at work. So he told her that he did not get hurt at work and was able to see Dr. Zink. Claimant then told Dr. Zink that he had been hurt at work, and Dr. Zink said he would not treat him. Claimant then asked for something to help his pain, and Dr. Zink wrote a prescription for Percocet. Dr. Zink's medical record of January 25 indicates that claimant complained of a right shoulder injury when he slipped on ice at home on January 3 and his arms flailed.

Claimant had another episode at work on January 29, 2011. He again slipped on ice, and his arm went up. The pain in his arm became more intense than before. He again finished his shift. The next day was Sunday, and he did not work. He went in to work on Monday, January 31, and spoke with his supervisor, Bill Stone. He told Mr. Stone he had hurt his shoulder at work and it was not getting better. Claimant then went on his route, performing all his work duties. When he returned, he spoke with Mr. Stone again and filled out some paperwork. At that time, he told Mr. Stone that he had injured his right shoulder twice, on January 17 and 29. Claimant was then sent to Tom Steck, who handles workers compensation issues for respondent. He testified he told Mr. Steck about both his accidents. Mr. Steck, in a memo dated March 25, 2011, indicated that claimant only told him about the January 17, 2011, accident and did not mention a subsequent work-related incident.

Mr. Steck sent claimant to respondent's wellness center, where he was seen by a nurse. He told her that he had been injured at work on two occasions. He was sent to have some x-rays and to have a drug screen. The results of the drug screen revealed that he had tested positive for benzodiazepines. Claimant said he has been taking Xanax since November or December 2010. The drug screen also showed he tested positive for oxazepam, which is sold under the trademark Serax. Claimant does not have a

prescription for Serax and has never taken Serax. Claimant testified that after his drug test was taken, he received a phone call at home from a doctor who said he wanted to talk about claimant's drug screen. The doctor asked claimant if he had been taking Valium. Claimant told the doctor he had a prescription for Xanax but had not been taking Valium. The doctor continued to ask about Valium, and finally claimant, after saying several times that he had not taken Valium, finally told the doctor that he may have accidently taken some. Claimant said he had been told by his personal physician that Xanax was just like Valium. And he thought by making that admission, the doctor would just go away. However, in his testimony at the preliminary hearing, claimant stated he had not taken Valium and that no one in his household has a prescription for Valium.

At some point, claimant was sent by respondent to have an MRI. After the MRI was taken, he was told by Mr. Steck that the insurance carrier believed that his shoulder injury was preexisting and his claim was denied. He was terminated from his employment at respondent on February 9, 2011, because of his positive drug screen. Claimant has not worked since being fired. In a memo dated March 29, 2011, respondent's human resources manager indicated that if claimant had not been terminated, respondent would have had light duty work available to him within his restrictions.

On February 14, 2011, claimant was again seen by Dr. Zink. The history given by claimant indicates he had right shoulder pain and had been "hurt [at] work."[3] Claimant reported that the MRI showed he had a tear but that workers compensation coverage was denied. The medical note went on to state: "F/U from original inj. 1/3/11 pt. slipped on ice [at] home. [T]hought pain was due to work related injury not fall . . . ."[4] Claimant stated that he never told Dr. Zink's office that he had fallen at home.

On February 23, 2011, claimant was seen by Dr. Prem Parmar at the request of claimant's attorney. Dr. Parmar believed that claimant had a symptomatic rotator cuff tear. Dr. Parmar opined that claimant's tear preexisted his injuries at work but that on the dates in question claimant probably enlarged his tear. Dr. Parmar believed that before the tear was enlarged, claimant was probably asymptomatic. Dr. Parmar believes that claimant is in need of surgery on his shoulder.

(1) *Did claimant suffer accidental injuries on January 17, 2011, and/or January 29, 2011, that arose out of and in the course of his employment with respondent?*

At the March 29, 2011, preliminary hearing, respondent denied that claimant suffered personal injury by accident on either date arising out of and in the course of his employment with respondent. Judge Howard failed to make any specific findings or

---

[3] P.H. Trans., Resp. Ex. A at 5.

[4] *Id*.

conclusions as to whether claimant suffered personal injury by accident or accidents arising out of and in the course of employment with respondent. But because he awarded benefits, it must be presumed that Judge Howard found the claim to be compensable. In order for a claim to be compensable, claimant's injury must be the result of an accident that arose out of and occurred in the course of the employment.

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[5] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[6]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[7]

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[8] The test is not whether the accident causes the condition, but whether the accident aggravates or

---

[5] K.S.A. 2010 Supp. 44-501(a).

[6] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[7] *Id.* at 278.

[8] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

accelerates the condition.[9] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[10]

Judge Howard apparently found claimant's testimony to be credible because he awarded benefits. The Board generally gives some deference to an ALJ's determination of credibility, particularly when the ALJ had the opportunity to personally observe the witness testify. The evidence contradicting claimant's testimony and version of events includes the claimant's failure to report the accidents to a supervisor on the date they allegedly occurred, the delay in seeking medical treatment, the fact claimant initially sought treatment on his own, and Dr. Zink's chart entry indicating that claimant reported the accident happened on January 3 at home. Claimant admits that he did not report his first accident promptly because he feared it might affect his job and because he wasn't sure how bad the injury was, apparently hoping it was temporary and would get better on its own without treatment. Claimant did report the second accident more promptly, although respondent's exhibit indicates claimant only reported the accident of January 17 to Mr. Steck. Finally, the drug test results suggest claimant was not entirely truthful about what medications he had taken.

According some deference to the ALJ's determination of claimant's credibility and thereby accepting claimant's explanations for the inconsistencies and contradictions in the record, this Board Member finds that by the barest of margins claimant has met his burden of proving he suffered personal injury as alleged by the two incidents and that those accidents arose out of and in the course of his employment with respondent.

(2) *Did claimant give respondent timely notice of his accidents?*

At the preliminary hearing, respondent denied that claimant provided it with timely notice of either alleged accident. However, Judge Howard failed to make any specific findings or conclusions as to date or dates of accident, when notice was given by claimant to respondent and whether it was timely. But because he awarded benefits, it must be presumed that Judge Howard found notice to have been timely.

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the

---

[9] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[10] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

> employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

Claimant first notified his employer of his accidents and injuries on January 31, 2011. This was 14 calendar days after his first accident on January 17, 2011, but within 10 days, excluding holidays and weekends.[11] The notice of January 31, 2011, was clearly within 10 days of the second accident date of January 29, 2011, if claimant included that second date of accident in his verbal reports to Mr. Stone and Mr. Steck. Neither Mr. Stone nor Mr. Steck testified. Claimant's testimony that he told both Mr. Stone and Mr. Steck of both accidents is only contradicted by Mr. Steck's writing of March 25, 2011.[12] Based on the record presented to date, this Board Member finds that claimant gave timely notice of both accidents.

(3) *Is claimant entitled to temporary total disability benefits when he was terminated for cause? Does the Board have jurisdiction over this issue?*

Judge Howard failed to make any specific findings or conclusions as to whether claimant is temporarily and totally disabled and, thus, entitled to temporary total disability benefits and whether claimant was precluded from receiving temporary total disability compensation due to termination for cause. However, because Judge Howard's Order provided for temporary total disability benefits to be paid, it must be presumed that he found claimant was entitled to receive those benefits.

K.S.A. 2010 Supp. 44-510c(b)(2) states:

> Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment. A release issued by a health care provider with temporary medical limitations for an employee may or may not be determinative of the employee's actual ability to be engaged in any type of

---

[11] *Bain v. Cormack Enterprises, Inc.*, 267 Kan. 754, 986 P.2d 373 (1999); *Vitale v. Lawrence Battery Co.*, No. 93,141, unpublished Kansas Court of Appeals opinion, 2005 WL 1805257 filed July 29, 2005; *Villalobos v. Norcraft Companies*, No. 1,036,674, 2008 WL 375821 (Kan. WCAB Jan. 16, 2008).

[12] P.H. Trans., Resp. Ex. A at 17.

> substantial and gainful employment, except that temporary total disability compensation shall not be awarded unless the opinion of the authorized treating health care provider is shown to be based on an assessment of the employee's actual job duties with the employer, with or without accommodation.

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.[13] This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.[14]

A termination for cause does not per se disqualify a claimant from receiving temporary total disability compensation.[15] On an appeal from a preliminary hearing order, the Board is without jurisdiction to review findings of whether claimant is temporarily and totally disabled.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[16] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[17]

CONCLUSION

(1) Claimant suffered personal injuries by accidents on January 17, 2011, and January 29, 2011, that arose out of and in the course of his employment with respondent.

(2) Claimant gave respondent timely notice of his accidents.

---

[13] K.S.A. 2010 Supp. 44-551.

[14] *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

[15] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009); *Tyler v. Goodyear Tire & Rubber Company*, 43 Kan. App. 2d 386, 224 P.3d 1197 (2010).

[16] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. __, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[17] K.S.A. 2010 Supp. 44-555c(k).

(3) The Board is without jurisdiction to review the ALJ's award of temporary total disability compensation at this stage of the proceedings.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Steven J. Howard dated March 30, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2011.

_____
HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Mark E. Kolich, Attorney for Claimant
Mark J. Hoffmeister, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge